UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA,

v. 23 CR 251 (AKH)

CHARLIE JAVICE
OLIVIER AMAR

Motions

Defendants.

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New York, N.Y.
January 23, 2025
10:50 a.m.

Before:

HON. ALVIN K. HELLERSTEIN,

District Judge

APPEARANCES

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Southern District of New York
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BY: ERICA PERDOMO

Also Present:

MICHAEL GARTLAND, Paralegal Specialist (USAO)

(In open court; cased called)

DEPUTY CLERK: Counsel, please state your appearances for the record.

MR. FERGENSON: Good morning, your Honor.

Micah Fergenson, Rushmi Bhaskaran, Nicholas Chiuchiolo, Georgia Kostopoulos for the government. We're also joined at counsel table by our paralegal Michael Gartland.

THE COURT: Good morning.

MR. SULLIVAN: Good morning, your Honor.

Ronald Sullivan, here at counsel table with Jose Baez on behalf of Charlie Javice, who is present.

MR. BUCKLEY: Good morning, your Honor. Sean Buckley, Steven Kobre, Johnathan Cogan and Alexandria Swette on behalf of Mr. Amar, who is present at counsel table.

THE COURT: Okay.

Let me take the competition first. Mr. Siegal, what is your position?

MR. SIEGAL: Good morning, your Honor.

THE COURT: Those who are going to be speaking, you don't need to wear a mask.

MR. SIEGAL: We've discussed with the government -- actually, they submitted a script late yesterday, your Honor. We had discussed actually potentially tabling this issue, but our position is --

THE COURT: We're not going to table the issue.

MR. SIEGAL: I have committed to not be the attorney cross-examining the investigator they have identified in their letter. We also, I think, are in agreement with the government that any references to my firm or me in the document they intend to offer will be redacted. Beyond that, the relief the government seeks, we will be opposing. We have no objection to a Curcio --

THE COURT: What is the relief beyond that?

MR. SIEGAL: The government --

THE COURT: The only other thing I remember is that you can't get involved in openings and closings.

MR. SIEGAL: Yes, your Honor, that is the extent to which we would object. Obviously, I would not -- to the extent I was doing argument to the jury, I would not be speaking in a voice that would suggest I have any personal knowledge of the events or the facts. To the extent I would be arguing to the jury, it would be based on testimony in the record, and that's it. And we don't think that the law supports the notion of precluding my availability to argue. And none of the cases cited by the government support that position. They said we can submit --

THE COURT: Mr. Fergenson.

MR. FERGENSON: Yes, Judge. That doesn't cure the problem. The law bars an attorney from acting as an unsworn witness during cross-examinations and also during jury

argument. It's for that reason we sought the relief we sought And the Court should bar Mr. Siegal from doing so.

THE COURT: He says he will just be talking about the evidence and not using any personal information that's not in the evidence.

MR. FERGENSON: The law, your Honor, just draws a clear line that potential witnesses who are attorneys in the case --

THE COURT: But he's not a witness.

MR. FERGENSON: He's a potential witness, your Honor.

THE COURT: Yeah, but we're talking about -- let's leave out openings. Let's just talk about closings.

MR. BAEZ: Excuse me, your Honor. Jose Baez. I can represent to the Court that Mr. Siegal is not doing neither openings or closings, so we can address that.

THE COURT: That does not solve the problem.

MR. BAEZ: Understood.

THE COURT: Mr. Siegal?

MR. SIEGAL: Your Honor, I'm not opening in the case.

THE COURT: And you're not closing in the case.

MR. SIEGAL: I guess I'm not closing in the case.

THE COURT: And you're not doing cross-examination.

MR. SIEGAL: I'm not cross-examining that witness, your Honor.

THE COURT: So all the relief the government wants is

there.

MR. FERGENSON: Thank you, your Honor.

THE COURT: I'll put this in an order, and we'll go on.

MR. FERGENSON: I think, your Honor, we don't need to do the Curcio script today, but at some point we would like to proceed with the Curcio hearing. It doesn't need to be today, your Honor.

THE COURT: I'm wondering why we need it, but it can't be harmful. Let me ask Ms. Javice. Is Ms. Javice here?

DEFENDANT JAVICE: Yes, your Honor.

THE COURT: So the law gives you the right to a conflict-free lawyer. You've heard that Mr. Siegal, because he may have been for the representation a potential witness, and now that he is where he is in terms of not being able to cross-examine or open or close -- not being able to cross-examine that particular witness or open or close, you're getting a counsel that cannot fulfill his duty to give you his zealous and full representation. That doesn't mean you shouldn't have him, but it's your choice, and I want to make sure that you exercise your choice intelligently and responsibly.

DEFENDANT JAVICE: I understand. Thank you, your Honor. I would like to proceed with Mr. Siegal.

THE COURT: With Mr. Siegal as your counsel, under the

circumstances I've laid out; namely, he cannot cross-examine any particular witness. He cannot open. And he cannot close.

DEFENDANT JAVICE: Yes, your Honor.

THE COURT: Okay. Anything else?

MR. FERGENSON: May I ask the Court to ask one more -- at least one more question, your Honor?

THE COURT: Yes, go ahead.

MR. FERGENSON: We'd ask the Court to allocute Ms. Javice on the fact that if she continues with Mr. Siegal as one of her trial counsel, she could not call Mr. Siegal as a defense witness.

THE COURT: Yes.

MR. FERGENSON: If, you know, they thought there was something inconsistent that our witness testified to, she could not then call Mr. Siegal.

THE COURT: That's correct. Mr. Siegal cannot appear as a witness in the case.

DEFENDANT JAVICE: I understand, your Honor.

THE COURT: Mr. Siegal, you understand that too?

MR. SIEGAL: I do, your Honor.

THE COURT: I think that finishes the motion.

MR. FERGENSON: Thank you, your Honor.

THE COURT: The motion is granted on consent.

The next motion I want to take up is a motion by the government to compel on a reciprocal basis.

What is it, Mr. Fergenson, that you are not getting that you want?

MR. FERGENSON: Your Honor, AUSA Chiuchiolo is going to address this motion.

THE COURT: What is it, Mr. Chiuchiolo, that you're wanting and not getting?

MR. CHIUCHIOLO: Your Honor, I'll start with Rule 16 and Rule 17 issues. The government has received no Rule 16 materials from the defense. We received for the first time shortly before we made our motion a small production from Mr. Amar of materials that the government had actually provided. And it appears in Mr. Amar's response that their view is "we'll give you stuff if we decide we're going to use them." And that really flies in the face of the rule and the mutual exchange that's supposed to happen.

And so we don't really know what they have that they might use, but we do know that Mr. Amar has issued several Rule 17 subpoenas. We have two of them, and the two we have are clearly improper on their face. They seek -- one is to the SEC, and one is to the FDIC, and they basically seek any records in the agency's possession that could reflect --

THE COURT: Let's do Rule 16 first.

MR. CHIUCHIOLO: There's an interplay, your Honor, because if they're planning to use Rule 17 subpoenas for purposes of --

THE COURT: When you say the subpoenas are not -- are not lawful subpoenas, that means the SEC and the FDIC have the opportunity to come in and move to quash.

MR. CHIUCHIOLO: I think the case law on that, your Honor, if the impropriety of a subpoena is before the Court, and we have these two subpoenas, the Court can and should rule on that. It's *United States v. Weissman*. And these two subpoenas which I can hand up to the Court, I mean, I -- in Mr. Amar's letter, they essentially concede as much. I think they offer to perhaps change the return date on the subpoenas, but I don't think that they are defensible on their face. But it raises the issue, your Honor, of what other subpoenas are out there that could also be improper.

We are not -- all we're asking is to just give us the subpoena returns, which is often what happens in most cases. Give us the subpoena returns so there's not unfair surprise, and we don't have delay during trial to try to figure this out. We're only two weeks before trial. It seems like a pretty reasonable request.

THE COURT: All right. Who's going to respond?

MR. BUCKLEY: Your Honor, Sean Buckley on behalf of Mr. Amar. I'm still unclear as to the exact relief that it is that the government is seeking. But let me just address the subpoena issue in turn. With respect to the large subpoena returns that have been received, they have been from JP Morgan

Chase, and those have been simultaneously produced to the government. So there is no issue with respect to those Rule 17 subpoenas that --

THE COURT: They're not interested in the subpoenas which you have produced. They're interested in the subpoenas you haven't produced.

MR. BUCKLEY: With regard to the subpoena that they identified that was issued to Zoom, I can represent to the Court that we do not intend to use any materials from Zoom in our case-in-chief nor do we intend to use those materials to impeach any witness. Beyond that, they are not entitled to those materials. We have complied with Rule 16.

THE COURT: Have you received production from the SEC?

MR. BUCKLEY: We have not yet, your Honor. The SEC requested that we extend its deadline to respond to the subpoena by one week by virtue of today's conference. I'm happy to address, if the Court would like to hear, the propriety of that subpoena because we disagree --

THE COURT: What about the subpoena to the FDIC?

MR. BUCKLEY: The subpoena to the FDIC, after some back and forth with various agencies within the FDIC was successfully served, I believe, two days ago. So its return has not yet been received. And these are materials, Judge, that relate to interviews conducted by the U.S. Attorney's Office.

THE COURT: Are you willing to produced what you receive?

MR. BUCKLEY: From those subpoenas, your Honor?

THE COURT: Yes.

MR. BUCKLEY: Yes. In fact, the government could have requested it. We request that --

THE COURT: Let's get into that. You're willing to produce them?

MR. BUCKLEY: From the SEC and the FDIC --

THE COURT: From the SEC and the FDIC, are there any other outstanding subpoenas?

MR. BUCKLEY: Yes, Judge. We also submitted another subpoena to JP Morgan Chase for an additional limited production. We have not received any materials in response to that subpoena.

THE COURT: Will you share such materials as you receive it from JP Morgan with the government?

MR. BUCKLEY: Your Honor, certainly if we intend to use them in our case-in-chief, we will share those returns with the government.

THE COURT: I didn't ask for a qualification. Will you share the materials you receive from JP Morgan with the government?

MR. BUCKLEY: Yes, your Honor.

THE COURT: All right. Now, regarding Rule 16, are

there any other things that are being withheld?

What's the answer?

MR. BUCKLEY: Judge, I'm not sure. Is that question directed at counsel for Mr. Amar?

THE COURT: You were speaking, so I asked you. Yeah, it was given to you.

MR. BUCKLEY: Whether there are any outstanding issues from the government's perspective with respect to Rule 16. Those were the ones identified in their motion. Those are the ones we came to address --

THE COURT: The answer is no?

MR. BUCKLEY: The answer is no, Judge.

THE COURT: There are no more documents to produce.

And with regard to Mr. Buckley's answers as to Rule 17 and Rule 16, are those answers satisfactory to the defendant Javice as well? Any position from defendant Javice?

MR. SULLIVAN: Yes, your Honor, we don't have a -- yes, your Honor.

THE COURT: What's left of the motion?

MR. CHIUCHIOLO: Thank you, your Honor. That resolves the Rule 16 and Rule 17.

Just quickly on Rule 26.2, I don't want to, you know, make a large issue here, but the Court did order disclosure of Rule 26.2 materials. It does seem from --

THE COURT: Experts.

MR. CHIUCHIOLO: Yes. And it does seem from Mr. Amar's response that they're sort of taking a hypertechnical meaning of the Rule's statement.

THE COURT: How so?

MR. CHIUCHIOLO: Well, I think they cite to the definition of statement such as it has to be substantially verbatim, contemporaneously recorded. That's the same definition of statement that's used in Section 3500. And obviously the government would never come in here and say, well, we're not going to produce any notes because they weren't "you know, substantially verbatim."

Rule 26.2 is designed to place the disclosure of prior defense witness statements on the same legal footing as the disclosure of prior government witness statements. So we're just asking -- all we're asking here is for reciprocal exchange of witness statements. The defense has noticed a lot of witnesses - 27 witnesses. We understand a lot of them are not -- the defense might not have access to them and so that's --

THE COURT: We're talking about -- let's make it specific. We're talking about attorneys' notes taken in interviewing or paralegal notes taken in interviewing potential witnesses for trial.

MR. CHIUCHIOLO: Exactly, your Honor. That's the heart of it, including experts.

THE COURT: Who is going to respond?

MR. BUCKLEY: Your Honor, with respect to Mr. Amar, again, it's Sean Buckley. The only arguments that the government has raised with respect to witnesses noticed by Mr. Amar pertain to expert witnesses.

THE COURT: Pertain to what?

MR. BUCKLEY: To expert witnesses. Mr. Amar has noticed three expert witnesses as potential witnesses at trial. We explained in our papers what the requirements of Rule 26.2 are.

THE COURT: Tell me what they are.

MR. BUCKLEY: The requirements of Rule 26.2 define what is a statement of a witness.

THE COURT: We're talking about experts, right?

MR. BUCKLEY: Of an expert witness, yes, Judge.

THE COURT: There's reports that have to be given. I take the position, as Judge Rakoff took the position, that the same rules of discovery that relate to experts in civil cases relate to experts in federal cases and in criminal cases. There is to be no surprise with experts.

I'm not going to delay the trial while the other side is given an opportunity to find out what the expert has been saying and not being told. So you're going to have to do a report and give the same scope of report to the government as the government gave to you.

MR. BUCKLEY: Yes, your Honor. And we have, to be clear, provided the required notice under 16(b)(1)(C) of the anticipated expert testimony that has been signed by each witness in compliance with Rule 16.

The government recently has moved in limine raising various issues but has not complained about the adequacy of that disclosure. Our position is Rule 26.2 for that very reason should not apply to expert witnesses because we have complied with our disclosure obligations under 16(b)(1)(C), and, therefore, they are not entitled to attorney work product or work product prepared by paralegals in our office at our direction in the course of meetings or interviews with potential testifying witnesses. Rule 26.2 just is not triggered here, Judge.

MR. CHIUCHIOLO: Your Honor, if I can respond?

THE COURT: One minute.

(Pause)

THE COURT: I think we're contesting 26.2(f)(1). A written statement that a witness makes and signs, that defendants have agreed to be produced if they haven't already produced it. And the next part is: Or otherwise adopts or approves. If notes are shown to the defendant, those are adopted or approved. If they're not shown, if they're just the paralegal's or attorney's, they don't fit into a written statement.

MR. CHIUCHIOLO: Your Honor, it's the same definition under 18 U.S.C. 3500. So if we were to take --

THE COURT: Yes, but the government customarily produces the notes of the interviewers.

MR. CHIUCHIOLO: All we're asking for is simple disclosure, which is exactly what the case law says Rule 26.2 is designed to do. It's to provide the exact same obligation on the defense that is on the government.

THE COURT: I don't think so.

MR. CHIUCHIOLO: Your Honor, I would --

THE COURT: It doesn't say so. The rule doesn't say so.

MR. CHIUCHIOLO: Your Honor, I would direct the Court to the Advisory Committee Notes on Section 26.2, which are cited in a Second Circuit case *United States v. Scotti*, 47 F.3d 1237, 1249, and again --

THE COURT: Which Advisory Note?

MR. CHIUCHIOLO: 26.2.

THE COURT: I'm looking.

MR. CHIUCHIOLO: It says: Rule 26.2 is designed to place the disclosure of prior relevant statements of an --

THE COURT: Which year's amendment are you looking at?

MR. CHIUCHIOLO: Well, the Second Circuit case is from 1995, your Honor, and it's quoting the Advisory Committee Notes of 1979.

THE COURT: I've read the note, and it supports the government's proposition. It cites the Supreme Court case of *United States v. Nobles*, 422 U.S. 225 (1975) which involved the notes of an interviewer. Without reference to it, it having been adopted or approved by the witness who was interviewed. The government demanded production at the time that production is required under the Jencks Act, that is after cross-examination, and when the defendant refused to produce, the trial court struck the testimony of the witness, and the Supreme Court upheld it.

Now, under the practice of this Court, followed as long as I've been a judge, which is 26 years, the government produces under the Jencks Act not only statements signed or approved or adopted by the witness, but all notes of an interviewer of a witness and of the court procedures that order production is accelerated to before the trial.

Under the Advisory Committee note explaining the rule, the same should apply here because, as is said by the Advisory Committee, I quote: "The rule, with minor exceptions, makes the procedure identical for both prosecution and defense witnesses, including the provision directing the court, whenever a claim is made that the disclosure would be improper because the statement contains irrelevant matter, to examine the statements in camera and excise such matter as should not be disclosed," which I will do.

So the government's motion is granted. Production has to be made.

MR. CHIUCHIOLO: Thank you, your Honor.

THE COURT: I didn't ask if the defendant Javice has any argument on the motion?

MR. BUCKLEY: Judge, if I can just be heard on that for a moment.

THE COURT: First, does the defendant Javice have anything to say?

MR. SULLIVAN: We don't have anything additional to add at this time, your Honor.

THE COURT: Thank you.

Mr. Buckley, you do though.

MR. BUCKLEY: Yes, your Honor. So the issue here unfortunately, is more nuanced, and that is because these are notes that are contained in attorney work product. Under 16(b)(2), attorney work product is shielded. Now, we do have notes. The notes are of varying degrees. They're incorporated into legal memos that reflect attorney thoughts, impressions --

THE COURT: Legal memos, if not shown to the witness, do not qualify as statements. The interview notes do.

MR. BUCKLEY: So --

THE COURT: The further use of the interview notes in attorney's work product is not required to be produced unless shown to the witness, okay?

MR. BUCKLEY: Okay, yes, Judge.

MR. CHIUCHIOLO: Judge, I would just ask - the Court had set a January 6 deadline - if we can get these materials by Monday?

THE COURT: Mr. Buckley?

MR. BUCKLEY: Your Honor, we will review and produce anything that is producible pursuant to the Court's order promptly. I will endeavor to do it by Monday, but I make no --

THE COURT: I need to give you a date.

MR. BUCKLEY: If I could have a moment, your Honor.

THE COURT: Sorry?

MR. BUCKLEY: If I could just have a moment to confer.

THE COURT: The same question will be put to Mr. Baez.

MR. SULLIVAN: This is Mr. Sullivan, your Honor. We will comply with the Court's order. I'm not sure that we have anything responsive, but to the extent we do --

THE COURT: If you don't respond, you have nothing to produce.

MR. SULLIVAN: Right.

MR. BUCKLEY: Judge, I don't think we have anything that is responsive to produce; but if we do, we will do so no later than next Friday, a week from tomorrow.

MR. CHIUCHIOLO: Your Honor, I thought Mr. Buckley said they do have witness notes.

THE COURT: If they have, he will be producing. If he

doesn't have, he's not going to be producing. Can you live with Friday?

MR. CHIUCHIOLO: Yes, your Honor, that's fine.

THE COURT: Okay. Production by Friday.

The only thing left now is the motion to sever. Are both sides making the motion? Are both defendants making the motion, or only Mr. Amar?

MR. SULLIVAN: On behalf of Ms. Javice, we filed the motion, so yes.

THE COURT: Okay.

MR. COGAN: Your Honor, on behalf of Mr. Amar, this is Johnathan Cogan. We haven't made a motion to sever, and so we haven't asked for a severance. We want to make sure that the defense that we're prepared to put forward, which is antagonistic in nature, isn't going to be curtailed in any way. If it's going to be curtailed, then we would want there to be a severance, but we have not made a motion for --

THE COURT: If I were to curtail a defense, I would triggering a mistrial, wouldn't I? Isn't that right? I can't restrict your ability to put in relevant information.

MR. COGAN: Yes, your Honor. Thank you.

THE COURT: That's self-evident.

MR. COGAN: I wanted to clarify that we were not making a motion to sever with that understanding. With that understanding, we haven't made a motion.

THE COURT: That kind of thing is an instruction to the jury.

What's the position of the defendant, Mr. Sullivan?

MR. SULLIVAN: That a limiting instruction is insufficient and will not cure the constitutional defect that exists. So our position is based on the limited information that we have, even that limited information that Ms. Javice is unable to receive a fair trial. There are a couple cases in the district courts of New York that are apposite for this issue. The *Shkreli* case, the *Nordlicht* case, which we cited n our brief, and based on the limited information we have, our position is that the problem is of constitutional dimensions.

Now, Mr. Amar's lawyers have indicated that they have additional information to the information that they provided, additional evidence and potentially additional testimony. We don't know what that is, but these very experienced lawyers from this district, many whom are former prosecutors, have used the word antagonistic. That word has meaning, as your Honor knows.

THE COURT: Who said that?

MR. SULLIVAN: Mr. Amar's counsel.

THE COURT: Who said antagonistic?

MR. SULLIVAN: Antagonistic to our defense. And they've also indicated that they're prepared to make a declaration.

I will also just point out -- we learned this on January 8, your Honor. And by January 10, we wrote your Honor as soon as it was brought to our attention that the defense was going to be antagonistic. And based on what we've seen, it is of an order of magnitude that it is sufficiently severe that a limiting instruction cannot cure it.

THE COURT: Well, I don't know what is meant by antagonistic, and there is nothing in the record now that shows any antagonism.

The allegation is that the defendants participated in the same transaction or series of transactions constituting the offense alleged in the superseding indictment. That means there is joinder that is permissible and in fact desirable because the acts are unified by some substantial identity of facts or participants or arise out of a common plan or scheme. And that's held by the Second Circuit in *United States v. Feyrer*, 333 F.3d 110.

The presumption is strong that severance should be denied. A defendant who seeks separate trials carries a heavy burden of showing that joinder will result in substantial prejudice, and that prejudice must be sufficiently severe to outweigh the judicial economy that will be realized by avoiding lengthy multiple trials.

This trial is a complicated trial. It promises to be a complicated trial. It will take weeks of the Court's and a

jury's time, and it would just be unnecessarily duplicative and useless to have two trials where there can be one. Limiting instructions are available to make sure that the jury understands that the guilt of each defendant must be judged separately. I will give those instructions, and I will be glad to get the help of the parties in drafting those instructions.

MR. SULLIVAN: May I be heard briefly, your Honor, just on one last thing?

THE COURT: Yes.

MR. SULLIVAN: So I would certainly encourage the Court to at least consider in camera, as Mr. Amar's lawyers have volunteered to do, the nature of the antagonistic defense because one of the other aspects of the balancing test that your Honor rightly articulated is, is the trial itself going to be disrupted by constant objections, constant sidebars, objections to the openings.

Right now we have no idea what they're going to say. And certainly if there is something objectionable, I have an ethical duty to stand up and object. I don't like to object during openings, obviously, and as a practice don't, but must if something comes out that we have not had time to test or vet. So there are a series of motions in limine that --

THE COURT: I will say this: I don't mind objections. It's my job to rule on objections. If something in an opening or a closing is objectionable, I want you to object. So I have

no rule against objections.

MR. SULLIVAN: Very well, your Honor.

THE COURT: I don't really take sidebars. We don't waste any time on sidebars. I depend on both -- all counsel to educate me on what's going to happen and what may be controversial, so I'm prepared and I will rule. If I need a sidebar, it will be very brief.

MR. SULLIVAN: We are absolutely unable to educate the Court on what may be controversial because we don't know. And that's sort of the point of the declaration, your Honor. We don't know what the nature of the antagonism is beyond what we've laid out generally, which we still maintain is sufficient.

THE COURT: Mr. Buckley will know, and he'll tell me in advance. I don't see any need to make this decision now. It's not Mr. Buckley saying that it's going to be at the derogation -- his defense is going to be at the derogation of Ms. Javice.

MR. SULLIVAN: I think it is, your Honor. That's certainly my understanding of the conversation.

THE COURT: You want me to hear anything?

Mr. Buckley?

MR. COGAN: I'm speaking on this, your Honor. This is John Cogan. I missed the question.

THE COURT: Do you want me to hear you out of the

hearing of the prosecution and Ms. Javice as to what you think might be at the expense of Ms. Javice?

MR. COGAN: Yes, your Honor. The very reason we're having this discussion now is because we spotted the issue that Mr. Sullivan just said, which is that we see --

THE COURT: So the answer is yes?

MR. COGAN: The answer is yes.

THE COURT: Does the government object?

MS. BHASKARAN: Your Honor, we have no opposition to the Court having an initial ex-parte inquiry on this issue. If, however, the Court determines that there is some sort of colorable issue that rises to the level of a mutually antagonistic defense, as that term has been explained by the Circuit, then we respectfully request enough information in order to respond because as the Court has noted --

THE COURT: I'll deal with that issue after I take the in camera discussion. So we'll have a brief recess. I'll have two people from the defense and Mr. Amar come to the robing room with the reporter. That part will be under seal.

(Pages 26 to 30 sealed)

(In open court)

THE COURT: We had an in camera discussion.

MR. SULLIVAN: Your Honor, I'm sorry. Co-defendant is not back in the courtroom yet.

THE COURT: Thank you very much.

Mr. Cogan and Mr. Buckley, is everyone here?

MR. COGAN: Yes, your Honor.

MR. BUCKLEY: Yes, your Honor.

THE COURT: Mr. Cogan, Mr. Buckley and Mr. Amar presented the information that was referred to in the Kobre & Kim letter of January 21.

After hearing the information, there is no need to change my ruling. There is really no antagonistic defense, certainly nothing that could rise to an unfairness as to either defendant. And so the motion to sever is denied.

MR. SULLIVAN: May I make a record, your Honor?

THE COURT: You may.

MR. SULLIVAN: Thank you, your Honor.

It is difficult -- on behalf of Ms. Javice, it is difficult to make an adequate record because I do not know what was said there, and I will be making an application shortly, but the record is this: That the doctrinal line between substantial prejudice that warrants a severance and one that does not seems to be whether the circumstances are beyond co-defendants merely finger-pointing. If it's that, then the

presumption that your Honor noted of joinder should be recognized.

However, if it's beyond that, and we are in a position where Ms. Javice -- where there is a realistic scenario where Ms. Javice will not only be prosecuted by the government but prosecuted by Mr. Amar, and she thus becomes prejudiced on two fronts, having to respond to the government and Mr. Amar.

At least we know what the government is going to say. We have no idea what Mr. Amar is going to say. So this prejudice is compounded in the sense that a jury gets to hear functionally the government's claim against Ms. Javice twice: Once from the government and once from Mr. Amar.

If it's on that side of the doctrinal line, it's considered reasonably cognizable prejudice. Your Honor in camera and here has made his ruling, I understand that. I certainly just wanted to make a record that normally in the cases where there is severance, where severance is granted, the moving party has an opportunity to make an argument as to what side of the doctrinal line the proffer falls on.

So we certainly would be making -- we'll be making an application to unseal for Ms. Javice's team the transcript of your Honor's hearing; otherwise, I don't think we're able to make an adequate record. That's point one.

Point two, the Court's ruling is now, I think, compounded by another data point we will advise the Court on.

We are not ready to argue this yet just because we don't have all the details, but the short is that we learned just last night that the government produced 9,500 additional documents that we've never seen before, and apparently from Mr. Amar's Google drive. This seems emblematic of this larger issue of -- I'm going to have difficulty even knowing what to say in opening if everything is sort of trial by ambush. And here I'm not making a normative claim against anybody; I am simply making a claim about the way it is received.

One of the benefits of the Federal Rules of Criminal Procedure is that there is no trial by ambush. We know what the evidence is against us; and if there is adverse evidence, even if it doesn't rise to the level of legally cognizable prejudicial evidence from Mr. Amar, it seems to me that we have some due process rights to know what that evidence is so that we can construct a defense.

So that's the record that I wanted to make.

THE COURT: What remedy do you seek?

MR. SULLIVAN: I'm sorry?

THE COURT: What remedy do you seek?

MR. SULLIVAN: Well, the Court has denied the remedy we seek. The remedy we seek is severance generally. Short of that, we --

THE COURT: That won't change with the 3,600 documents or whatever the number was.

MR. SULLIVAN: 9,500 documents. So literally 10,000 documents out of a 13,000 document disclosure. Ms. Perdomo has dealt with that issue and knows more specificity, the conversations between her and the government as recently as last night.

THE COURT: What remedy do you ask? You asked for severance. I denied it.

MR. SULLIVAN: Right. The second level --

THE COURT: What remedy do you want?

MR. SULLIVAN: We would like access to the transcript of the discussion that your Honor had in camera to be able to make an adequate record as to -- as to, the way I will put it what side of the doctrinal line those representations fall on.

THE COURT: I deny that.

MR. SULLIVAN: And brief indulgence.

THE COURT: However, after the close of the case, please renew the motion, and I'll entertain it again.

MR. SULLIVAN: Very well, your Honor.

Depending on the nature of these documents -- and I'm just flagging this, we might seek an adjournment. This is premature at this point. I haven't seen any of them, but we do know that at least 9,500 of them are brand new. So I just don't know the salience yet, but we may have an application before your Honor very shortly.

MR. BUCKLEY: And, Judge, this is Mr. Buckley on

behalf of Mr. Amar. We similarly are troubled by these late disclosures. We're trying to get to the bottom of it. We've been having some back and forth. We needed answers from the government. We think that this could give rise to a suppression motion that would be material to the evidence that the government intends to offer at trial. But we need the answers to our questions first, and we haven't gotten them yet. So we would ask --

THE COURT: What are the questions?

MR. BUCKLEY: The questions relate to -- bear with me for one second, your Honor. We sent an email detailing the questions to the government last night.

THE COURT: Do I have a copy? Did you file on ECF?

MR. BUCKLEY: We could certainly file it, your Honor.

THE COURT: You don't have to, but did you?

MR. BUCKLEY: We did not. This was some back and forth with the government hoping to get some clarity on the issue before we had to flag it for the Court. Ms. Perdoma has --

THE COURT: Maybe we should have the government explain why, what happened.

MR. BUCKLEY: If we could perhaps put the questions on the record that we think are necessary to be answered in order to inform the nature of the relief that would be sought, and --

THE COURT: Let's get the government's explanation,

and you can do whatever you want to do.

MR. FERGENSON: Thank you, your Honor.

The government made a supplemental Rule 16 production yesterday. It's about 13,000 files in total, your Honor. These are files that came from a search warrant return, and that the government realized the day before yesterday had not been produced to both defendants in a joint production.

THE COURT: When did you get those documents?

MR. FERGENSON: They were produced by Google in October of 2023. We are not intending to use these documents in our case, your Honor.

THE COURT: So they've been sitting with you for 14 months?

MR. FERGENSON: No. Let me give the full background to the Court just so you have it.

We received -- we got a search warrant in October 2023. We received files from Google for what's called a Google drive account. It's like an online document-sharing platform offered by Google, your Honor. These were for the two work accounts used at Frank by the defendants, each defendant. The government produced in full to each defendant that defendant's account.

THE COURT: When?

MR. FERGENSON: In October, after receiving the files from Google.

What the government realized two days ago that there had been files that the government had tagged as responsive to the search warrant that hadn't been produced to, you know, jointly to both defendants, meaning, your Honor, there are some of the 13,000 that were produced yesterday that hadn't been produced to Amar, and there's some, you know, that were in Javice's account and vice versa.

THE COURT: How can you distinguish what to give whom in a joint trial?

MR. FERGENSON: This was -- this is the government's standard practice when it gets an account like this, Judge. We give the full account to the person that was using the account.

THE COURT: It's a terrible procedure.

MR. FERGENSON: Fair enough, your Honor. And look, we made a mistake and not --

THE COURT: It's a terrible procedure. Everyone has to be on equal plane. It's not right that the government holds information that will drip out to each particular defendant. If it's required to be produced, it's required to be produced in a trial.

MR. FERGENSON: And we realized that it had not been produced to both, your Honor, and we produced them yesterday.

THE COURT: What do you think I should do now?

MR. FERGENSON: I am not sure there is much to do, your Honor, because we're not seeking -- these were

documents --

THE COURT: How would you like to get 13,000 or 9,500 documents, whatever the number, a week and half before trial when you're preparing your jury challenge, you're preparing your opening, you're preparing your witnesses. How would you like that?

MR. FERGENSON: I take your point, your Honor.

THE COURT: Why did it happen?

MR. FERGENSON: We made a mistake. It was an oversight, and when we realized it, we fixed it.

THE COURT: Mr. Clark may say to me "I made a mistake." What does that do to say "I made a mistake"? you've been sitting on these documents 14 months.

MR. FERGENSON: That's not entirely correct, your Honor, but let me offer at least a couple points.

THE COURT: What's not correct about it?

MR. FERGENSON: We -- these documents were being reviewed for responsiveness to the search warrant. They should have been produced earlier.

THE COURT: In October.

MR. FERGENSON: But -- well, Judge, the entirety of each account is produced to that --

THE COURT: You want everything that defendant gets on a subpoena produced to you, but you don't give everything that you received by subpoena to others.

MR. FERGENSON: Well, this was a search warrant, your Honor, and that is what I think makes it a little different. You know, we don't actually have the authority --

THE COURT: What's the definition of the scope of a search warrant? What documents can you legitimately ask for?

MR. FERGENSON: It was -- I don't have the search warrant in front of me, your Honor, but it was a warrant to these -- to Google --

THE COURT: Only if the artifacts of a crime were evidence of it, right?

MR. FERGENSON: That's correct your Honor.

THE COURT: And almost by definition, if this is a crime that authorized the search warrant, every document is relevant.

MR. FERGENSON: That was not the way we conducted the review, your Honor.

THE COURT: You told me that. I am not criticizing you for that.

MR. FERGENSON: Fair enough, your Honor.

I do want to make clear, your Honor, that the documents we produced yesterday, we were not, we are not seeking --

THE COURT: I read in the paper today about the sloppiness of the government in producing in the Menendez trial documents that should not have been produced to the jury. And

I'm hearing a tale now that in a different way is the same thing. It's not proper behavior. If this were a civil trial, Mr. Sullivan would be making a motion for sanctions under Rule 37.

MR. FERGENSON: What I can promise to your Honor is that we acted in good faith. We did make a mistake.

THE COURT: There is no point in getting more into this.

What relief do you want, Mr. Sullivan?

Ms. Perdomo.

MS. PERDOMO: Your Honor, Erica Perdomo.

THE COURT: I don't like you bending over so much. You'll hurt your back.

MS. PERDOMO: Erica Perdomo on behalf of defendant Javice.

I want to draw a couple distinctions and then answer your question about relief. One of -- one point to add to the narrative that Mr. Fergenson described is that there was a search warrant in October of 2023, we understand. And in April of 2024, there was an initial production of what the government deemed were responsive documents of about 11,000 documents. So the government had already produced responsive documents pursuant to what we understood was their review of these drives. And so it is very unclear how there is an additional set of responsive documents that's more than 13,000 documents

on the eve of trial.

THE COURT: You'll always find there's more.

MS. PERDOMO: Right now, your Honor --

THE COURT: You'll always find there's more. We are where we are. What's the remedy you want?

MS. PERDOMO: Well, where we are right now is that we haven't been able to finish processing these documents in our electronic document system, and so I would ask the Court allow us to craft a remedy in the form of a motion because right now these documents could include *Brady*, they could include --

THE COURT: At this point, what relief do you want, if any?

MS. PERDOMO: At this point, if we had to ask for some relief, it would be the relief of additional time --

THE COURT: How much?

MS. PERDOMO: -- to review these documents.

MR. BUCKLEY: Can we confer, your Honor?

MS. PERDOMO: Your Honor, please let us confer.

THE COURT: Maybe you don't need the time. You're both -- you're all prepared, so time is not --

MS. PERDOMO: Your Honor, I do in fact that at a minimum need some time. 9,500 of these documents that Ms. Javice received yesterday came from Mr. Amar's Google drive. As your Honor alluded to the communications that these defendants had within their email really formulate --

THE COURT: How much time do you want? How much time do you want?

MS. PERDOMO: We would want at least 30 days, your Honor.

THE COURT: Talk amongst yourselves because you're all ready to try the case and time doesn't help you either.

MS. PERDOMO: Your Honor, we'd ask for 30 days or one month.

MR. BUCKLEY: Judge, when you're ready, there is something I want to add to this as well.

THE COURT: I'm ready.

MR. BUCKLEY: In addition to the time necessary to review these materials, there are real constitutional implications of this. It's a Fourth Amendment violation, a reasonableness violation. This issue has come up, as the Court noted, time and again. Recently with Judge Nathan in the *Wei* case and *Najad*. The government is not permitted to go back and re-search the materials that it represented both to the Court and to the service provider that it would not search again without getting a new warrant. So we may seek suppression --

THE COURT: Let me understand this. The government gets a pack of documents, and because it didn't notice at the first instance that it made a full production for whatever reason, and then looks at it again at a later time and decides it needs to make more production, that doesn't mean you need a

new search warrant. You still have the documents that were given that you took under the first search warrant.

MR. BUCKLEY: Judge, they took those documents under a representation to the Court that they would only take documents responsive to the warrant. Again, I don't want to necessarily get into this. This is one of the things that we need additional information about what was taken by whom, when and given to whom because it could inform --

THE COURT: Who's the aggrieved party the government took more than it's supposed to?

MR. BUCKLEY: The defendants, your Honor.

THE COURT: They didn't take the documents from you. They took the documents from Google.

MR. BUCKLEY: Correct, your Honor.

THE COURT: They're not your documents.

MR. BUCKLEY: Your Honor, there is established law that makes clear that documents taken from an electronic service provider, an internet service provider like Google that this can form the basis for a motion to suppress.

MR. FERGENSON: May I be heard, your Honor?

MR. BUCKLEY: We're just teeing this up, your Honor. We're not making the motion now. We need to understand the scope of this and understand additional information from the government.

So I just wanted the Court to be aware that it isn't

merely a question of us familiarizing ourselves with the documents, but that there are potentially very significant legal issues here that we will have to move to suppress.

MS. PERDOMO: To what Mr. Buckley just said, and as Mr. Buckley noted, this came up late last night, so we are not fully briefed on this yet, but there is a staleness doctrine in the Second Circuit.

THE COURT: A what?

MS. PERDOMO: Staleness with respect to search warrant of --

THE COURT: Salience?

MS. PERDOMO: Staleness, your Honor. Like bread will go stale? Staleness. S-T-A-L-E-N-E-S-S.

THE COURT: Staleness?

MS. PERDOMO: Correct.

THE COURT: What's stale?

MS. PERDOMO: The warrant itself, your Honor, may be stale. And as Mr. Buckley alluded to, we would like the opportunity to --

THE COURT: How could it be stale? The government is not seeking more documents. Am I right?

MR. FERGENSON: Correct.

THE COURT: The government has all the documents it took. So I recognize there may being an argument that there was an unconstitutionality in taking more than they should have

taken, and that's what Mr. Buckley is arguing, but it's not a staleness argument.

MS. PERDOMO: Well, there is case law related to staleness in terms of revisiting electronic documents that were taken pursuant to a warrant, but --

THE COURT: You can always go back. That's what happens in trials. You're always going back. You always see more relevance to things that get passed over.

MR. FERGENSON: Judge, like --

THE COURT: Let's go back to this. You want 30 days?

MR. FERGENSON: Your Honor, if I may be heard briefly on that? Just very briefly on the points that were just raised.

THE COURT: Give me a moment, please.

MR. FERGENSON: Yes.

(Pause)

THE COURT: How long is this trial supposed to take?

MR. FERGENSON: I believe we've estimated our case at four weeks, your Honor. And that would not include the defense case, which appears to be lengthy.

THE COURT: May we go off the record?

(Off the record)

THE COURT: Folks ready?

MR. BUCKLEY: Yes, your Honor.

MR. FERGENSON: Your Honor, the government will give

its position, your Honor, which we would submit that an adjournment is either not necessary or a short adjournment of maybe a week is appropriate.

We would want to offer this context for the Court. Of the documents from this search warrant return in its entirety -- look, the government is preparing for trial, but we presently expect to actually use and offer at trial three documents, and they're metadata. That's what the government is going to actually use. The 13,000, we don't -- we weren't intending -- we don't intend to use any of those.

THE COURT: Have you identified those three?

MR. FERGENSON: We -- they are part of our Government Exhibits.

THE COURT: Have you identified them?

MR. FERGENSON: Not yet, but we are happy to do that, your Honor, to the defense.

THE COURT: All right.

MR. FERGENSON: One further note on that, Judge. Like I said, the government estimates four weeks for its case. We have some flexibility in when we can call witnesses. We're planning to call a records custodian from Google to put in those three records and their metadata. We could call that witness at the back of our case. That allows for a period of potentially almost four weeks' additional time.

THE COURT: The three documents you're talking about

would come at the end?

MR. FERGENSON: Correct, your Honor. We're happy to do that.

THE COURT: All right. Let me hear from the defendants.

MS. PERDOMO: Your Honor, defendant Javice's position that these 13,000 documents were documents identified as relevant to this case by the government. So the fact that they only intend to use three suggests to defendants that it is likely there are documents defendants may want to use in this very large set.

Moreover, Mr. Amar was the numbers guy. This is a case about numbers, and there was almost 10,000 documents of his that Ms. Javice has never seen. Our position is that in order to review these documents in the way they need to be reviewed, we would ask your Honor to move the trial to after Passover, to the 21st of April, so we can have this case prepared and not be interrupted by the holiday.

MR. BUCKLEY: And, Judge, on behalf of Mr. Amar, we agree that this is a much broader issue than just three documents. We don't think the proposal of moving a Google witness to the end of the trial remedies the situation at all.

We do need to review these documents, including several thousand documents that are new to us as well, for our defense. On behalf of Mr. Amar, we would propose March 3, so a

three-week continuance. That still affords six weeks for the trial to go on prior to the holiday.

THE COURT: Would that be satisfactory, Ms. Perdomo?

MS. PERDOMO: Your Honor, that would not be satisfactory for the Javice team. We do feel we need more --

THE COURT: Why you feel you need more time?

MS. PERDOMO: Part of the reason is also the three weeks puts us right up at six weeks, puts the Passover holiday at the end of six weeks, and we do not know precisely how long the government's case is going to be. We have two defendants here putting on a defense, and we do not want to be prejudiced by having to rush that defense for some end date of the trial.

MR. FERGENSON: Your Honor, just one brief additional comment from the government, which is that our IT -- we asked our IT folks to see how many of the 13,000 are duplicates, meaning what they identify as the same file being repeated.

THE COURT: Did you organize them according to some searches?

MR. FERGENSON: We could do that, your Honor, if it would be helpful to the defense.

THE COURT: Have you done that?

MR. FERGENSON: No. No. We have organized -- we can -- you can distinguish which account they came from and from our -- this duplication review that our IT folks did, it appears the majority of these are duplicates. So the new --

the unique files is a lot less than 13,000, and we can provide that analysis to the defense so it can help them expedite their review, your Honor.

MR. BUCKLEY: Judge, respectfully, the numbers that we've gotten just in the past 48 hours --

THE COURT: Let's stop this. I want to look at my calendar.

(Pause)

THE COURT: Be seated everyone.

Instead of starting the trial on February 11, we will start the trial on February 18. It's a one-week adjournment. There are 10,000 documents that are newly produced constituting, I understand, Amar's and Javice's documents. The Amar documents have already been shown to Amar. The Javice documents have already been shown to Javice. And there are duplications as well, so it's considerably going to be less than 10,000 documents. And whether that's a burden, there are enough lawyers to accomplish that.

The price of adjourning beyond that, I run into another criminal trial that needs to be tried, and it's unnecessary to do that as the scarcity of large courtrooms that are required for this trial. We are not going to try the case in this courtroom. We are going to try the case in, I think it's 23B, right, Brigitte?

DEPUTY CLERK: Mmm-hmm.

THE COURT: In 23B. That's the ruling. We will keep the final pretrial conference on February 4.

MS. PERDOMO: Your Honor, may I make a statement for the record?

THE COURT: You already did. You can do it again.

MS. PERDOMO: Thank you, your Honor. Just for the sake of clarity, there are, as the government has represented to defendants, 13,271 total new files produced. 9,559 of those Ms. Javice has never before reviewed, which is why the Javice team was saying 10,000. Those are the documents Ms. Javice has never seen before.

And with respect to the government's representations of duplicates, that is not a representation that the defense team has very high faith in given the changing numbers over the last 24 hours in our conversations with the government and given the very intricate nature of these documents which come from a drive where the defendants did all of their work at Frank.

For instance, they would edit a spreadsheet. If one little thing changed from one document to another, that would be considered a new document, and I don't know that the government is able to certify that those two documents are not duplicates. The de-duplication would be something we would need to undertake on our own as defendants because of the complicated nature of these documents.

THE COURT: Okay. Anything else?

MR. FERGENSON: Your Honor, we have one very quick logistical question for your Honor about the trial schedule.

Our understanding is that your Honor typically does not sit on Fridays during trial.

THE COURT: Well, we make exceptions. There will be exceptions.

MR. FERGENSON: Understood. Okay. Should -- for this trial, should we plan to have witnesses appear -- there's just some out-of-town travel involved your Honor, and so --

THE COURT: I will commit to you that we will work on the 21st.

MR. FERGENSON: Okay. And then the typical trial day schedule, your Honor?

THE COURT: Starts at 10:00 and ends at 5:00. But some days will end at 4:00.

MR. FERGENSON: Thank you, your Honor.

THE COURT: The 18th we will pick the jury and we will go until 4:00. We'll see. It will work. We'll move the case.

MS. PERDOMO: Your Honor, defendant Javice reserves the right to renew our motion for a continuance upon review of the documents which we have not been able to access yet.

THE COURT: I didn't hear you. Say it again.

MS. PERDOMO: Defendant Javice reserves the right to renew our motion for continuance.

THE COURT: Anyone can make a motion at any time. I have no rules for motions. You want to make a motion, make a motion. You don't need to reserve anything.

Anything else folks?

MR. FERGENSON: Not from the government.

THE COURT: It's been a pleasure.

Oh, one more. Javice wants a web page. Sit down, please.

Javice wants a web page. Put on the record, Mr. Fergenson.

MR. FERGENSON: Yes, your Honor, in short, we don't have what she's requesting. We didn't archive the full Frank website. The web page that we had taken down, we produced long ago.

THE COURT: That is viewed as a motion. Motion denied. There is nothing more to produce.

Anything else folks?

MR. FERGENSON: No. Thank you, Judge.

THE COURT: Thank you.

(Adjourned)